United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7027

To be argued by
LAWRENCE R. ENO

United States Court of Appeals
For the Second Circuit

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, in behalf of its membership affected and in behalf of Classes involved herein, GARY MICHAEL, MICHAEL FAGAN, and MARTIN F. RANDOLPH, JR., individually and as Class Representatives, and in behalf of all other parties similarly situated and circumstanced,

Plaintiffs,

INDEPENDENT INVESTOR PROTECTIVE LEAGUE and
MARTIN F. RANDOLPH, JR.,

Plaintiffs-Appellants,

I. WALTON BADER,

Appellant,

v.

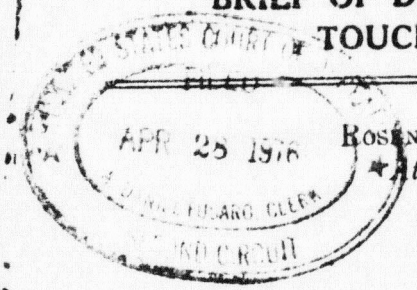
TELEPROMPTER CORPORATION, TOUCHE, ROSS & COMPANY, HERBERT SCHLAFLY, WILLIAM BRESNAN, MARVYN CARTON, "JOHN DOE" and "RICHARD ROE", the names "JOHN DOE" and "RICHARD ROE" being fictitious, the parties intended being those persons, firms, corporations and associations involved in the unlawful acts involved herein,

Defendants,

TOUCHE, ROSS & COMPANY,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE TOUCHE ROSS & CO.



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Plaintiffs,

INDEPENDENT INVESTOR PROTECTIVE LEAGUE and MARTIN F. RANDOLPH, JR.,

Plaintiffs-Appellants,

I. WALTON BADER,

Appellant,

v.

TELEPROMPTER CORPORATION, TOUCHE, ROSS & COMPANY, HERBERT SCHLAFLY, WILLIAM BRESNAN, MARVYN CARTON, "JOHN DOE" and "RICHARD ROE", the names "JOHN DOE" and "RICHARD ROE" being fictitious, the parties intended being those persons, firms, corporations and associations involved in the unlawful acts involved herein,

Defendants,

TOUCHE, ROSS & COMPANY,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE TOUCHE ROSS & CO.

Statement

This is an appeal from an order dated January 9, 1976 of the United States District Court for the Southern District of New York (Owen, J.) filed January 13, 1976 (JA A5, A25-42).* The notice of appeal from said order designated

* The symbol "JA" in parentheses refers to pages of the Joint Appendix. There are certain pages in the Joint Appendix preceded by the symbol "A—" which are preceded herein by the letter A. The symbol "SA" in parentheses refers to pages of the Supplemental Appendix.

as appellants Independent Investor Protective League and Martin F. Randolph, Jr., two of the plaintiffs in the action, and I. Walton Bader, Esq., their counsel (JA A12).

The order appealed from granted the motion pursuant to Fed. R. Civ. P. 37(b) and (d) of appellee Touche Ross & Co. ("Touche Ross"),* a defendant in the action, to dismiss the action as to it and to require the payment to Touche Ross of its expenses, including attorneys' fees, incurred by reason of the circumstances which led to the entry of said order (JA A25-42). The District Court directed that the expenses be paid by Independent Investor Protective League and Mr. Bader (JA A41-42).** The District Court also stated that, with respect to Mr. Bader, it was referring the record for further consideration pursuant to Rule 5(f) of the General Rules of the District Court providing for the disciplining of attorneys (JA A42).

The action in which the motion was made is a class action on behalf of stockholders of Teleprompter Corp. brought by four plaintiffs [namely, Independent Investor Protective League ("IIPL"), Martin F. Randolph ("Randolph"), Michael Fagan ("Fagan") and Gary Michael ("Michael")] against Teleprompter Corp., Touche Ross and other defendants alleging violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 (JA 249-257).

After the aforesaid motion had been made on September 13, 1974 before Judge Owen, and while the motion was pending before him, the action was on November 18, 1974 consolidated with other similar actions, without prejudice, however, to any order that Judge Owen might make in the proceedings then pending before him (JA 433). The consolidated action is proceeding before Hon. Lloyd F. MacMahon, U.S.D.J. (JA A1 *et seq.*). The aforesaid four plaintiffs have not been included as plaintiffs in the consolidated complaint (JA A2; 601).

* Its name is misspelled in the caption.

** Those expenses have not yet been fixed by the District Court.

Preliminary Matters

Appellants' Brief raises a number of points, and we hereafter deal with each of them in the order presented by the appellants (p. 26 *et seq. infra*).

Appellants' Brief (e.g., pp. 9, 11, 12, 18-19, 24) refers to matters not in the record relating to the answers of the plaintiff Michael Fagan. Since these have been referred to by appellants, although improperly, we are obliged to deal with them and do so at pp. 24-25 *infra*, where we show that they merely confirm the correctness of the findings of the District Court.

Appellants' Brief (p. 3) states that, in connection with a motion to remand, "important new evidence has been adduced which clearly explains all of the open areas in this case." While appellants have made such a motion, there is no such evidence. They refer to the aforesaid answers of plaintiff Michael Fagan and to the matter appearing in the second footnote at p. 13 *infra*.

Appellants' Brief in several places (e.g., pp. 3, 14, 18, 25, 43) states that certain matters are "conceded." Such matters are by no means "conceded." They were, in fact, contested.

Facts

Appellants' Brief does not discuss the facts. It simply asserts a number of conclusions which are not supported by the evidence. As the decision of the District Court shows (JA A25 *et seq.*), consideration of the evidence is of prime importance.

This action was begun on September 26, 1973 (JA A10). On November 1, 1973, Touche Ross addressed simple interrogatories to the plaintiffs inquiring primarily with respect to their stockholdings, and those of IIPL's members,* in Teleprompter Corp. (JA 322-325). No an-

* IIPL alleged that it was an unincorporated membership organization whose purpose is to protect the rights of security holders and whose members included stockholders of Teleprompter Corp. (JA 249 *et seq.*).

swers having been received, Hon. Thomas P. Griesa, U.S.D.J., who was then assigned to the case, orally directed on December 11, 1973 that answers be served (JA 226-227). After the case had been reassigned to Hon. Richard Owen, he similarly directed that answers be served, and such answers were required to be served by February 5, 1974 (JA 238, 226-227).

Although plaintiffs secured no extension of time, no answers were received until July 15, 1974, when a purported set of answers dated July 11, 1974 was received in the mail (JA 237, 263-270). The only answers served were those of IIPL (no answers being served by the individual plaintiffs) and IIPL's answers were manifestly insufficient and unresponsive. Accordingly, on August 2, 1974, Touche Ross made a motion, pursuant to Fed. R. Civ. P. 37(a), for an order compelling answers (JA 235 *et seq.*).

The time when any further answers were to be served was an issue on the motion. Plaintiffs asked for 60 days in which to serve further answers, to which Touche Ross objected, asking that the answers be required to be served within 10 days (JA 288, 292). The motion was returnable August 16, 1974, and at the argument in open Court with Mr. Bader present, Judge Owen granted the motion and directed that the further answers be served within 20 days (JA 293, 398). His order, endorsed on the papers and filed that day (JA A10; 293, 293a), reads as follows:

> "Motion granted in its entirety and is to be complied with in twenty days time.
>
> So Ordered
>
> 8/16/74 /s/ Richard Owen
>
> U.S.D.J."

The 20 days provided in Judge Owen's order expired on Thursday, September 5, 1974.

On September 6, 1974, under postmark of September 5, Touche Ross' counsel ("the Rosenman firm"*) received in the mail a copy of the purported answers of IIPL (JA A27; 476-544). The same day, in a separate enclosure, also under postmark of September 5, copies of purported answers of the individual plaintiffs, Randolph, Fagan and Michael, were also received (JA A27-28; 548-557).

All of these copies were unconformed, nothing appearing to indicate that they had been signed or sworn to by the plaintiffs, except that the IIPL answers had written in, in the verification, the words "/s/ Merrill Sands" (JA 343-347). Merrill Sands ("Sands") was an officer of IIPL (JA 64). The copy of the answers of IIPL bore the typed date September 5, 1974 and the copies of the answers of Randolph, Fagan and Michael each bore the typed date August 29, 1974 (JA 479, 550, 553, 556). These last three plaintiffs lived in States other than New York: Randolph in California, Fagan in Connecticut and Michael in Vermont (JA 544, 548, 552, 555).**

That same day, September 6, the Rosenman firm mailed a letter to plaintiffs' counsel, Mr. Bader, requesting that the originals of the several answers be immediately filed pursuant to Rule 6(c) of the General Rules of the District Court. The letter also noted the failure to conform the copies of the several answers and requested information regarding the same, including whether they had actually been signed and sworn to by the several plaintiffs (JA 583-584).

On the following day, September 7, the Rosenman firm sent another letter to Mr. Bader correcting an error in the September 6 letter (JA 585).

On Monday, September 9, 1974, at 9:15 A.M., a receptionist in the office of the Rosenman firm received a mes-

* Then Rosenman Colin Kaye Petschek Freund & Emil; presently Rosenman Colin Freund Lewis & Cohen.

** Mr. Bader had waited until August 29 to mail proposed answers to these three persons for them to consider, execute if appropriate, and return (JA A28; 108).

sage from Mr. Bader for Lawrence R. Eno, Esq., the partner in charge of this matter, stating (JA 579-580; A28; SA 17-18):

> "Rec'd your letter about Teleprompter case. Will send you photo copies of original Interrogatory answers within next few days."*

Later on September 9, at 10:37 A.M., Mr. Bader called Mr. Eno again; Mr. Eno was not available to take the call; and Mr. Bader could not be reached when Mr. Eno returned the call (JA 204-205, 595).

That same day, September 9, 1974, the Rosenman firm hand-delivered a letter to Mr. Bader stating that the telephone message was unsatisfactory, that they were prepared to come immediately to Mr. Bader's office to inspect the originals, and if that was not permitted by the end of the day, or if the originals were not by then filed, they would assume that Mr. Bader did not have the originals, and did not have them on September 5, 1974, and would proceed accordingly (JA 594).

In obvious response to that letter, at 9:25 A.M. on September 10, 1974, Mr. Eno's secretary received a message from Mr. Bader to the following effect (JA 582; A29-30; SA 19-20):

> "Mr. Bader called. Re Interrogatories. He will be sending photo copies of the original answers. He extends his apologies. He will extend your time to answer for 2½ or three weeks."**

At about 10:30 A.M., Mr. Eno called Mr. Bader and was told that he was unavailable. After Mr. Eno had stated to Mr. Bader's secretary that the matter was urgent and that if he did not hear from Mr. Bader he intended to communicate with the Court, Mr. Bader called Mr. Eno at about 12:30 P.M. Mr. Eno told Mr. Bader he was not satisfied with the messages that he had been receiving and that

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* The receptionist testified that this message was accurate and complete (JA 145-146).

** Mr. Eno's secretary testified that this message was accurate and complete (JA 147-148).

he wanted to see the original answers of all the plaintiffs immediately. Mr. Bader said that Mr. Eno had a right to see them but that he was busy on a deposition and could not show them immediately, but would in a few days. Mr. Eno insisted on seeing them that day and told Mr. Bader that he did not believe that Mr. Bader had the originals. Mr. Bader then stated, "I have them, you can take my word for it." Mr. Eno said that he wanted to see the originals, and that he or his associate, Mr. Nevling, would meet Mr. Bader in his office later that day after the deposition. Mr. Bader said that was not possible because he did not know where in his office the originals were and he might have left them at home. Mr. Eno said that he would then meet Mr. Bader in his office at 9:00 A.M. the next morning, to which Mr. Bader agreed (JA 207-209, 596).*

Mr. Eno immediately sent to Mr. Bader by hand a letter confirming that in the aforesaid conversation Mr. Bader had said that at 9:00 A.M. the following day he would exhibit the originals of the answers of Randolph, Fagan and Michael, as well as those of IIPL; and stating that if this were not done the matter would be taken up with the Court (JA 593).

Early on the morning of September 11, Mr. Nevling went to Mr. Bader's office where Mr. Bader showed him the original answers of IIPL. They were dated September 5, 1974 and purportedly were sworn to on September 5, by Merrill R. Sands, as Secretary of IIPL, in New York County. Mr. Bader was the notary who took Sands' signature and the answers were also signed by Mr. Bader (JA 370). Mr. Bader's certificate of service stated that he had mailed copies to all attorneys on September 5, 1974 (JA 371).

* As the District Court noted in its decision, Mr. Bader at the hearing at first denied having any recollection of this conversation, even though it had been previously detailed in letters to the Court and in affidavits (JA A31; 43-44, 300, 395, 591; SA 8-9). Indeed, it was referred to in a letter of Mr. Bader dated September 11, 1974 (JA 546). The Court found that the conversation had occurred as stated (JA A30-31).

Mr. Bader also exhibited the original answer of Randolph dated August 29, 1974 and purportedly sworn to on Sepember 3, 1974 by Randolph in California; and the answers were also signed by Mr. Bader (JA 422-425). Mr. Bader's certificate of service stated that he had mailed copies to all attorneys except the Rosenman firm on September 10, 1974 (JA 425).

When Mr. Nevling asked for the answers of Fagan and Michael, Mr. Bader said that he could explain, and gave Mr. Nevling an affirmation dated September 11, 1974 which Mr. Bader had drawn to support a motion for extension of time to answer. The affirmation merely stated that the answers of Fagan and Michael had not yet been received. No explanation as to how copies of those answers came to be mailed on September 5 was given in the affirmation or to Mr. Nevling (JA 196-197, 385-386).

The foregoing events precipitated a series of letters, motions and hearings before the Court, at which witnesses were sworn and testified. The conclusion of the District Court from all the evidence was that on September 5, 1974 Mr. Bader mailed the unconformed copies of all the answers to the Rosenman firm, and that his purpose was to have that firm believe that all the answers had been received by him, when in fact they had not been, and that they were due and timely served in accordance with the Court's order on the very last day for such service, September 5, 1974 (JA A39-40). The Court found that the answers of Fagan and Michael had concededly not been received by September 5, 1974 (JA A40). The Court also found that the answers of Randolph had not been received on that day and that there was no credible evidence that the IIPL answers had been timely executed and served (JA A40-41).

The District Court further found that the various, varying, changing and inconsistent explanations given by Mr. Bader with the assistance of Sands, the official of IIPL, was a "concocted story"; and that they both "made false statements and gave false testimony pursuant to an evolving plan to first deceive counsel and later the Court as to

the circumstances surrounding the mailing of the purported 'answers' to interrogatories . . . on September 5, 1974" (JA A39-40).

It is not possible within the confines of this brief to detail all of the many inconsistencies and circumstances contrary to human experience which branded as false the stories told by Mr. Bader and Sands. We shall, however, detail enough of the evidence to demonstrate beyond dispute that not only is the District Court's conclusion supported by the evidence but that it was compelled by the evidence.

Immediately after Mr. Nevling's visit to Mr. Bader's office, the Rosenman firm on September 11, 1974 hand-delivered a letter to the Court and to Mr. Bader setting forth the gist of the circumstances that have been described (JA 590-592). In response, Mr. Bader that same day sent a letter to the Court (JA 545-547). In that letter, Mr. Bader made the following statements, subsequently shown to be untrue:

1. That on September 5 he had Sands sign the IIPL answers; that he instructed his secretary to send copies of those answers to all defendants; and that he inspected those copies before they went out and they were "properly conformed."*

2. That in the afternoon of September 5, he "had to leave the office for St. Louis Missouri"; that before he left the office he prepared copies of the answers which he intended to conform and mail when he returned from St. Louis; that by "inadvertence" on September 5 "apparently" a set of the unconformed answers had been sent to the Rosenman firm [nothing being said as to who had "inadvertently" sent the copies]; and that on September 5 he was told during his absence from the office that the "answers to the interrogatories by Randolph had arrived" [nothing being said as to who had conveyed this information].

* The copies of the IIPL answers that were sent out were not, of course, "properly conformed" (p. 5 *supra;* JA 346).

3. That on September 9, while he was again out of the office, he was told [by someone not identified] about the receipt of Mr. Eno's letter of September 6, but he did not know its contents; and believing the letter referred to the answers of Randolph, Fagan and Michael, he called Mr. Eno's office on September 9 and left a message that he "hoped to receive the signed copies of those interrogatories and would be mailing them in a few days," and called again on September 10 leaving a message that he "hoped to receive the signed copies of the original documents in a few days."*

4. That it was not until 6:00 P.M. on September 10, 1974 that he found out what had occurred.**

A copy of Mr. Bader's letter of September 11 to the Court was received by the Rosenman firm on September 13. A letter was that day hand-delivered to the Court, with a copy to Mr. Bader, showing that various statements in Mr. Bader's letter were incorrect and inconsistent with what had actually taken place (SA 8-9). That same day the motion pursuant to Fed. R. Civ. P. 37(b) and (d) was made by order to show cause (JA 294-295).

In response to that motion, Sands, purportedly on September 17, 1974, executed an affidavit in which he stated that he was the one who had by "inadvertence" mailed the unconformed copies of the Randolph, Fagan and Michael answers "upon my visit to Mr. Bader's office late in the day of September 5th, 1974"; that prior to mailing them he had seen Randolph's answers "which had arrived late in the day at Mr. Bader's office and I then assumed that I could send out the copies thereof" (JA 418-421).

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* These were not, of course, the messages that Mr. Bader had left, which on both occasions were to the effect that he would be sending "*photocopies* of *original* answers" (emphasis added), showing that he knew that questions had been raised as to the originals of the answers, as he also clearly demonstrated he knew in his conversation with Mr. Eno at about 12:30 P.M. on September 10, 1974 (pp. 6-7 *supra*).

** This statement was inconsistent with Mr. Bader's conversation with Mr. Eno at 12:30 P.M. on September 10, 1974 (pp. 6-7 *supra*).

On September 20, 1974, Judge Owen heard argument on Touche Ross' motion to dismiss and on plaintiffs' motion for an extension of time with respect to the answers of Fagan and Michael (JA 210). On the argument of the motions, Mr. Bader, as the Court found (JA A35-36), made the following statements to the Court (JA 210-212):

(1) That he left his office on September 5 at about 3:00 P.M.; (2) that Sands was with him when he left the office, and he told Sands that if the answers of the other plaintiffs came in he, Sands, should mail out the copies; (3) that after he, Mr. Bader, left the office, Randolph's answers came in and that Sands had inadvertently mailed out copies of all the answers instead of just Randolph's; (4) that Randolph's answers had come in in the 3:00 o'clock mail on September 5; (5) that he did not recall when he first learned that the unconformed copies had been sent, but he knew that when he spoke with Mr. Eno on September 10 (which was about 12:30 P.M.).*

At the conclusion of the argument, the Court denied the motion for an extension of time with respect to the answers of Fagan and Michael, stated that the complaint would be dismissed as to them, and ordered a hearing, thereafter fixed for October 11, 1974, into the circumstances relating to the service of the copy of Randolph's purported answers on September 5, 1974 (JA 601, 428). The Rosenman firm served a notice of this hearing and requested the appearance thereat of Sands and Mr. Bader's secretary (JA 428).

Mr. Bader then engaged in efforts to avoid the hearing. On October 9, he wrote a letter to Judge Owen (JA 558-560) stating that Sands would not voluntarily appear at the hearing and that it would be necessary to obtain compulsory process to have him appear. He further stated that his

* No reporter was present when these remarks were made. They were recorded in a memorandum prepared by Mr. Eno immediately after the argument (SA 10-11), were testified to by Mr. Eno at the hearing (JA 210-212), and were supported by the Court's notes of the argument which stated: "Bader said to Sands on Sept. 5: If answers come in want you to send answers out." (JA 219, 597).

secretary knew nothing of the matter.* He noted that he felt it "appropriate" to file a purported notice of voluntary dismissal under Fed. R. Civ. P. 41(a)(1)(i) as to Randolph (SA 5-7) which he said "moots" the hearing. He further asked that, if the hearing was to go forward, it be set for October 25, 1974. Judge Owen thereafter set the hearing for November 4, 1974.

On October 12, Mr. Bader signed an affirmation that because of "irreconcilable differences" between himself and Sands, who, Mr. Bader said, had refused to follow his advice, a lawyer, Arthur Kass, Esq., of Croton Falls, New York, had been substituted in place of Mr. Bader as attorney for IIPL (JA 464-467). On October 17, 1974, Mr. Bader purported to file voluntary dismissals under Fed. R. Civ. P. 41(a)(1)(i) on behalf of Fagan and Michael (JA 231). On October 28, 1974, Mr. Kass proceeded to file a purported notice of voluntary dismissal on behalf of IIPL, and also on behalf of Fagan and Michael although he had not been substituted as their attorney (JA 228). Mr. Kass, although served with copies of all papers, was never heard from again and Mr. Bader continued to appear for IIPL (JA 1, 3-4).

The hearings commenced before Judge Owen on November 4 and continued on November 13 and 14, 1974 (JA 1 *et seq.*). The witnesses at the hearing included Mr. Bader, Sands, Mr. Bader's secretary (Ms. Blacker), the receptionist and secretary in the Rosenman firm who had taken the messages on September 9 and 10, and Mr. Eno.

Sands appeared voluntarily at the hearing, despite Mr. Bader's prior claim that he would not do so and despite the "irreconcilable differences" that Mr. Bader claimed existed between them (see JA A35 ftn. 9). Although initially Mr. Bader tried to indicate that he did not know too much about Sands (JA 5-6), facts were developed that

* Mr. Bader later filed an affidavit of Ms. Blacker in a further effort not to have her appear (JA 426-427), and she did not appear at the first day's hearings where Mr. Bader testified that she knew nothing of the matter (JA 4). The Court thereafter suggested that it would be appropriate for her to appear, and she did so (JA 94-95, 98).

indicated that Sands lived in Brookfield Center, Connecticut, where it appeared Mr. Bader (who has an apartment in Scarsdale) had his legal residence; and on the third day of the hearings it appeared that Sands was Mr. Bader's brother-in-law (JA 149, 156, 166).

It also appeared that Mr. Bader's secretary, Ms. Blacker, worked Tuesdays, Wednesdays and Thursdays from approximately 10:30 A.M. to 3:30 P.M. (JA 426-427). She also testified that she had never seen Sands in Mr. Bader's office on Thursday, September 5 and, in fact, had never seen him in her life (JA 121-122, 123-124). It further appeared, contrary to the statement in Mr. Bader's letter of September 11 (p. 9 *supra*), that Ms. Blacker had never mailed copies of any interrogatories on September 5 (JA 112, 8-9, 10).

Before the hearings commenced, Mr. Bader had received from the Post Office a letter dated October 16, 1974 stating that the last mail delivery for his office was scheduled for 1:15 P.M. to 2:30 P.M. (JA 474).* Mr. Bader, however, testified, before proof to the contrary was adduced, that the last mail delivery to his office usually came in at about 3:30 P.M. (JA 16). Testimony of a Post Office official at the hearings subsequently showed that the last mail delivery to Mr. Bader's office on September 5 took place between 1:30 P.M. and 1:45 P.M. (JA 93-94).**

* The 2:30 P.M. time was actually the time the mail carriers quit their jobs at the Post Office for the day and the last delivery is made prior to that time (JA 89-91).

** Appellants' Brief, p. 43, refers to an affidavit of Vincent J. La Porta ("La Porta"), the mail carrier who delivered the last mail on September 5. This is not a part of the record on appeal and we refer to it only because it is mentioned, although improperly, in Appellants' Brief. The affidavit, dated February 10, 1976, was presented on appellants' motion to remand. La Porta does not in any way question that the last mail was delivered between 1:30 P.M. and 1:45 P.M., but simply states that he gave that mail to a secretary who sat at the front desk and adds "It was my normal practice, in delivering all mail to suite 1801 at 274 Madison Avenue to deliver this mail to the said secretary who was the office receptionist." Mr. Bader stated and Ms. Blacker testified that the office mail was delivered at that front desk (JA 559, 103). La Porta's affidavit thus simply confirms that on September 5 the last mail was delivered as mail was normally delivered.

Faced with Ms. Blacker's testimony that she had not mailed any copies of answers on September 5 and that neither that day, nor at any other time, had she seen Sands, Mr. Bader and Sands presented the following story:

On September 5, Sands had come to Mr. Bader's office at about 8:30 A.M., this requiring Sands to leave his home in Brookfield Center, Connecticut at about 6:30-6:45 A.M. (JA 66-67). Sands signed the IIPL answers, Mr. Bader acting as the notary, and Sands then took and mailed the copies of those answers (JA 6-8, 68-70). Sands left the office at or before 9:30 A.M. (JA 70, 8), before Ms. Blacker arrived (JA 8).

There was no explanation as to why Sands had come to Mr. Bader's office that early, or why he had left that early —except to avoid Ms. Blacker. Sands had no pressing engagements in New York: he testified that he had no appointments to meet (JA 71). After leaving Mr. Bader's office, his testimony was in effect that he drifted rather aimlessly about the City, making a number of telephone calls, dropping into a brokerage office to watch the ticker, wandering through the fur district (JA 70-71). He could not recall anyone he met whom he knew (JA 71-72). Finally, Sands came up with the name of a person he met, one Sol Sturman, but he had forgotten that just previously he had testified that when he went to call on Sturman, he wasn't there (JA 72, 70). Indeed, no reason was given as to why Sands had come to New York at all. The president of IIPL, one Richard Gordon, who had signed the IIPL answers in July 1974, had an office close to Mr. Bader, and there was no explanation of why he was not called upon to sign the second set of IIPL answers (JA 166-167).*

* Despite the fact that Mr. Bader testified that there was no particular reason why he did not have Gordon sign the second set of IIPL answers, after the Rosenman firm had made a point of this in its brief after the hearings closed, Sands submitted an affidavit stating that it was he, as Secretary of IIPL, who had "control" of its membership list and therefore Gordon "could not" verify the answers since they dealt with the membership list (JA 451), although the first set of answers, verified by Gordon, dealt with the same membership list (JA 263-270).

As already noted, the IIPL answers bore the date September 5, 1974. Ms. Blacker testified that she dated papers the day that she typed them and she recalled no instructions otherwise as to the IIPL answers (JA 140-141).* The District Court concluded that the IIPL answers were typed on September 5 in the period between 10:20 A.M. (when Ms. Blacker said she arrived in the office) and about 3:15 P.M. (shortly before Ms. Blacker left) (JA A41; 119, 15). This being so, the IIPL answers could not have been signed and notarized before 9:30 A.M. as claimed by Mr. Bader and Sands (JA A41). Indeed, if those answers were signed by Sands and notarized by Mr. Bader on September 5, that must have occurred after Ms. Blacker left at about 3:30 P.M. since Ms. Blacker never saw Sands. Mr. Bader must then have been in his office at that time, which he denied (JA 11, 18).

The story told by Mr. Bader and Sands continues:

Before Sands left Mr. Bader's office at about 9:30 A.M. on September 5, Mr. Bader showed Sands an open envelope on his desk, said that it contained copies of answers that had to go out that day but could not until the answers arrived (JA 68). Mr. Bader told Sands that he had to go to St. Louis and asked Sands to return to the office about 4:00 P.M. to see if the answers had come in, saying that he would call Sands after 4:00 P.M. (JA 15-16, 68-69).

Faced with the Post Office letter of October 16, 1974, setting the last delivery at between 1:15 P.M. to 2:30 P.M., Mr. Bader had to retreat from the 3:00 P.M. departure time from his office that he had given to the Court on September 20 (p. 11 *supra*); and he now testified that he could not say when he left his office any closer than sometime

* After Ms. Blacker testified, Mr. Bader said that his "best recollection" was that he asked Ms. Blacker to type the IIPL answers on September 4 and to date them September 5 because he expected Mr. Sands in his office on September 5 to sign them (JA 194). The District Court rejected Mr. Bader's belated "best recollection" (JA A37).

between 12:00 noon and 2:00 P.M. (JA 11-12).* The answers had still not come in (JA 15). Since it could be established that he had not gone to St. Louis at all on September 5, Mr. Bader now testified that he did not go from his office to St. Louis but rather went to the New York Law Institute where he stayed until about 7:00 P.M. (JA 17-18).

Meanwhile, according to Sands, after wandering about town, he returned to Mr. Bader's office at about 3:45 P.M. (just in time to miss Ms. Lacker); he went through the mail in the front office and found Randolph's letter from California; went into Mr. Bader's room, opened the envelope, threw the envelope into the wastebasket without noticing the postmark, and waited for Mr. Bader's call (JA 71, 73, 74-76).

At about 4:15 P.M., Mr. Bader called Sands at Mr. Bader's office. Sands said ". . . you don't have to worry, the Teleprompter answers are here." Mr. Bader said "fine, good." Sands said "go, have a good trip now." Mr. Bader said, "good." That was the entire conversation (JA 18-19, 76).

Both Mr. Bader and Sands testified that Mr. Bader gave Sands no instructions and did not then or earlier in the day tell Sands to mail the unconformed copies (JA 19-21, 15, 78-79, 84, 177).** Nevertheless, immediately after the phone call, Sands, without looking in the envelope that was lying on Mr. Bader's desk to see what was in it and without knowing what was in it, sealed the open envelope and mailed it at about 4:20 P.M. (JA 77-78, 84).

Mr. Bader testified that he left the New York Law Institute to catch an 8:05 P.M. plane from Newark to St. Louis; but he missed the plane, returned to New York and went to his home in Scarsdale (JA 152-154).

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* It was only after Mr. Bader had thus testified that it was established that the mail was actually delivered between 1:30 P.M. and 1:45 P.M.

** This is contrary to what Mr. Bader had told the Court on September 20, when he said that Sands was with him when he left the office at 3:00 P.M. and that he told Sands to mail out the copies if the other answers came in (p. 11 *supra*).

The District Court rejected this story in its entirety (JA A-39). With respect to the story, the following may be noted:

1. Nothing was offered to explain why Mr. Bader asked Sands to return to the office at 4:00 P.M. to see whether the answers had come in. Mr. Bader said that he wanted to know so that if the answers did not come in, he could make a motion for an extension of time on Monday, September 9,* when he expected to return to his office (JA 16). Since he did not expect to make the motion before September 9, and since he expected to be in the office on September 9, when he would know in any event whether the answers had come in, Mr. Bader could not explain the reason for his having Sands return to check the mail (JA 16-17).

2. According to Mr. Bader's story, when he missed the plane to St. Louis on September 5, he returned to New York and arrived at Grand Central (JA 153). He arrived at about 9:30 P.M. (JA 440). Grand Central was but a few blocks from his office at 274 Madison Avenue (between 39th and 40th Streets) (JA 470). Mr. Bader testified that he knew that September 5 was the last day to serve the answers and he was concerned about that—so concerned that he had had Sands hang around the City all day just to see if the answers had arrived (JA 12, 21, 176). He also testified that after his phone call with Sands he believed that the answers of all the individual plaintiffs had arrived and he did not know that the copies had been mailed (JA 181, 34, 37). There was still time for him to go to his office from Grand Central and either mail the copies at the central Post Office before midnight (so that a September 5 postmark would appear on the envelope) or in a letter box before midnight (so that he could truthfully certify that he had served the answers on September 5 by mailing copies that day).** Yet Mr. Bader did not go to his office at all but went home from Grand Central (JA 153-154). The inference from his

* Several days after the time for service of the answers had expired.

** Fed. R. Civ. P. 5(b).

own testimony is unmistakable that Mr. Bader knew on September 5 that the copies had been mailed.

3. Although September 5 was the last day for service of the answers and Mr. Bader was concerned about that, he testified that he never asked his secretary, Ms. Blacker, to look for the signed answers in the mail (even though she left the office long after the last mail delivery) and he gave her no instructions about the unconformed copies (JA 15-16, 18, 12-13). Further, even though it developed at the hearing that Mr. Bader had a partner in the office, a Mr. Scher, and even though Mr. Scher had a full time secretary, Mr. Bader testified that he never asked either of them to check his mail the afternoon of September 5 (JA 104-105, 151-152, 443). Instead, he had Sands hang around the City all day on September 5 in order to check Mr. Bader's mail.

4. The entire alleged conversation between Mr. Bader and Sands at about 4:15 P.M. on September 5 was to the effect that the "Teleprompter answers" had arrived (JA 19, 76). Mr. Bader was expecting three answers: one from California, one from Vermont and one from Connecticut (JA 351, 354, 357). Yet he did not ask Sands which answers had come in and Sands did not tell him (JA 19-20). Mr. Bader's only explanation for not asking was that he was "very rushed at the time" (JA 19). At the time, of course, he was allegedly in the New York Law Institute where he remained until about 7:00 P.M. (JA 18).* And on the basis of that conversation, Mr. Bader concluded that all three answers had coincidentally arrived at the same time from three separate individuals mailing from three widely separated parts of the country (JA 181).**

* Nor did Mr. Bader ask Sands what answers had come in when he subsequently saw him on September 8, when Mr. Bader was not rushed (p. 19 *infra*).

** In his letter of September 11 to the Court (p. 9 *supra*), Mr. Bader had said that on September 5 he was told that Randolph's answers [not the "Teleprompter answers"] had arrived, and that on September 9 and 10 he told the Rosenman office that he "hoped to receive the signed copies of those interrogatories and would be mailing them in a few days" and that he "hoped to receive the signed copies of the original documents in a few days."

(footnote continued on next page)

5. As the District Court found (JA A37-39), the entire story defies belief: that Sands, the client, although he could in his phone talk have asked Mr. Bader what to do about the copies in the open envelope on the desk, nevertheless, immediately after hanging up the phone, took it upon himself, with no instructions from Mr. Bader, to seal and mail the envelope.*

The story told by Mr. Bader and Sands continues:

Mr. Bader testified that he went to St. Louis on September 6, returning the night of September 7, and while in St. Louis he learned that he had to be in Washington, D.C. on Monday, September 9 (JA 154-156, 171). On September 8, he visited Sands in Brookfield Center, Connecticut (JA 156). They did not discuss the answers and Sands did not tell Mr. Bader that he had mailed out the copies of the answers (JA 48, 79-81, 181).

Instead, Mr. Bader asked Sands to go to his office in New York on September 9 to check his mail because he hadn't been there the afternoon of September 5, or on Friday (September 6) or Saturday, and was not going to be there Monday; just to stop in and read him the return addresses on the envelopes (JA 27-28, 157). He asked Sands to get to the office as close to 9:00 A.M. as possible, and he gave Sands a key to the office (JA 157-158, 28).

Mr. Bader testified that on Monday, he took an 11:00 A.M. flight from La Guardia to make a 1:30 P.M. appointment in Washington, D.C. (JA 28-29). He called Sands

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These statements were obviously made to lead the Court to believe that on September 9 Mr. Bader was under the impression that all the answers had *not* arrived and that he was expecting them in a few days; and that that was what he had told the Rosenman firm on September 9 and 10. Those statements could not stand when the subsequent proof showed the actual messages left at the Rosenman firm and Mr. Bader's conversation with Mr. Eno on September 10 when he claimed to have the originals of all the answers. So Mr. Bader simply turned his story around to state that on September 9 he believed all the answers had arrived.

* *Cf.* Mr. Bader's statements to the Court on September 20 (p. 11 *supra*).

at about 9:00 A.M. from the airport (JA 28-29). Sands was in Mr. Bader's office and told him that Mr. Eno had written him "a letter" (JA 26-27). Sands did not open the letter or tell Mr. Bader what was in the letter and Mr. Bader did not ask him to open the letter and to see what was in it (JA 32-33). Mr. Bader said that he assumed that Mr. Eno was complaining that he had not gotten copies of the Randolph, Fagan and Michael answers (JA 27, 37-38). Mr. Bader testified that he then called Mr. Eno's office and left a message that he would be sending copies in a few days (JA 34-35).

Mr. Bader said that he returned from Washington, D.C. on September 10 on the 7:00 A.M. shuttle; went directly to a deposition for which he was very late; and made his 9:25 A.M. call to Mr. Eno's office simply because he had not spoken personally to Mr. Eno on September 9, and left the same message as he had the day before (JA 30-31, 35, 173-174).

Mr. Bader got back to his office at about 6:00 P.M. on September 10 (JA 25); found Mr. Eno's letters of September 6, 7, 9 and 10 all unopened (JA 49, 179); found Randolph's answers but not Fagan's or Michael's (JA 37); found that the envelope to the Rosenman firm with the unconformed copies was missing; and then for the first time realized that unconformed copies had been mailed to the Rosenman firm (JA 36-37, 48-49).

This contrived story* was the best invention possible to account for the statements in Mr. Bader's letter of September 11 to the Court that on September 9, Mr. Bader, while out of the office, had heard about Mr. Eno's letter of September 6 but did not know its contents; that he assumed that Mr. Eno was complaining, not that he had received unconformed copies, but that he had not received *any* copies, of the answers of the individual plaintiffs; and

* Refuted on its face by, among other things, the actual messages left with the Rosenman firm on September 9 and 10 and Mr. Bader's conversation with Mr. Eno at about 12:30 P.M. on September 10 (pp. 6-7 *supra*).

that the messages that Mr. Bader had left on September 9 and 10 were that he "hoped to receive the signed copies of those interrogatories and would be mailing them in a few days" and that he "hoped to receive the signed copies of the original documents in a few days."*

There are several matters to be noted about this portion of the "concocted story":

1. Although Mr. Bader testified that he knew that he already was late in service of the answers under the Court's order, that he thought that all the originals were in his office, and that he was anxious about the mail that might have in the interval been received in his office, he did not, when he arrived in Newark from Washington on September 7 at about 10:00 P.M. go to his office, nor did he go to his office on September 8 (JA 12, 27, 155, 156, 189). Instead, on September 7 he went to his home in Scarsdale and on September 8 he went to visit Sands.** Here again, the conclusion is inescapable that Mr. Bader knew that the unconformed copies of the answers had been mailed.

2. It is inconceivable, if Randolph's answers had arrived on September 5 and if Sands, unbeknownst to Mr. Bader, had then mailed out the unconformed copies, that this would not have been the subject of some discussion between them on September 8.

3. There was no need for Sands to get up at dawn to come from Brookfield Center, Connecticut to be in Mr. Bader's office at 9:00 A.M. on September 9. According to his own testimony, Mr. Bader took an 11:00 A M. plane from La Guardia. Assuming that Mr. Bader took that and not a later plane, he could have come to his office at or before 9:00 A.M. (as Sands allegedly did) and still have

* See second footnote, p. 18 *supra*.

** Appellants' Brief, pp. 14-16, argues incorrectly (pp. 26-28 *infra*) that Mr. Bader had until September 9 to serve the answers. If that were so, why, knowing he was not going to be in his office on September 9, did he not go to his office the night of September 7 or on September 8?

had ample time to catch his 11:00 A.M. plane.* And, as already noted (p. 18 *supra*), there were other people in Mr. Bader's office who could have read to him the return addresses on the envelopes.

4. The idea that Mr. Bader wanted Sands only to read him return addresses is likewise unbelievable. Mr. Bader said that he did not ask Sands to open the envelope from the Rosenman firm because he was "rushed to death" and did not think the letter could be urgent (JA 42-43). If he did not think the letter was urgent, why did he then call Mr. Eno's office at 9:15 A.M.? And why did he repeat the call at 10:37 A.M. that day (JA 204-205, 595)? And why did he call Mr. Eno's office at 9:25 A.M. on September 10, a call which Mr. Bader said he made when he was dashing for a deposition and which he made simply because he had not reached Mr. Eno on September 9 (JA 31)? As for being "rushed to death," Mr. Bader's alleged talk with Sands on Sepember 9 was at 9:00 A.M., *two hours* before Mr. Bader's plane left and he was already at the airport.

5. On September 9, two letters had arrived in Mr. Bader's office from Mr. Eno: one the letter of September 6 and the other the letter of September 7 (p. 5 *supra*). If Mr. Bader assumed from one letter that Mr. Eno was complaining about not being served with any copies, what did Mr. Bader assume the other letter referred to?

Mr. Bader's story continues:

He testified that it caused him "great concern" when at about 6:00 P.M. on September 10 he realized what had happened (JA 51-52). He said that he did not know who had taken the copies from his desk and mailed them: it could have been Ms. Blacker, Sands, Mr. Scher, Scher's secretary or a number of people (JA 50).

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* As shown below, Mr. Bader could have made his 9:15 A.M. call to the Rosenman firm from his office; taken a cab to La Guardia; made his 10:37 A.M. call to the Rosenman firm from La Guardia; and still have caught his 11:00 A.M. plane—or he could have done the same by using a bus that served La Guardia leaving only a short distance from his office (JA 469-470).

Although Mr. Bader testified that he thought Sands might have mailed the copies (JA 50) and although Sands was the most logical, and the first, person to ask, Mr. Bader never asked him whether he had mailed the copies. If Mr. Bader's story were genuine, he would have been on the telephone to Sands the evening of September 10—the moment he allegedly first discovered what had happened. Sands testified that although he spoke to Mr. Bader after September 10 and before September 15, and although Mr. Bader was telling him that he had "big problems" in the case (JA 80-81, 82),* it was not until Sunday, September 15, that Sands asked what had happened. Mr. Bader replied that he had told his secretary that she must have mailed the copies without telling him and she had denied it, at which point Sands volunteered that he had mailed them (JA 81).

As for Ms. Blacker, Mr. Bader said that he did not try to get in touch with her on September 10 because not only did he not have her phone number, but he did not have her address: it was nowhere in his office and he did not put it on her withholding forms (JA 52, 53-54). Ms. Blacker contradicted this, testifying that Mr. Bader did have her address (though not her phone number) and it did appear on her withholding statements (JA 100). Mr. Bader said that he was out of his office on September 11 but called Ms. Blacker on the phone that day to tell her she had gotten him into "one hell of a lot of hot water" (JA 50-51, 54), and that the next day he "sure did have" a conversation with her (JA 50). Ms. Blacker testified that she did not shortly after September 5 have any conversation with Mr. Bader about what had occurred that day (JA 120), that Mr. Bader never said to her that she had gotten him into hot water (JA 126), and that when he did speak to her it was simply to ask her whether she had mailed the copies (JA 125-126). The District Court found that this was "window dressing for the court hearing that was foreshadowed." (JA A39).

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* Sands testified that it was he who was directing the "strategy" in this action (JA 65, 418).

On the basis of all this evidence the conclusion of the District Court was inescapable: that on September 5, 1974 Mr. Bader had himself mailed the unconformed copies to create the impression that he had all the original answers and that due and timely service was being made; that he thereafter sought to lead the Rosenman firm to believe that was in fact the case; and that when finally compelled, under threat of Court action, to reveal that he did not have all the originals, he and his client IIPL, through Sands, collaborated to create a "concocted story" and "made false statements and gave false testimony pursuant to an evolving plan to first deceive counsel and later the Court as to the circumstances . . . ."

The answers of Fagan and Michael had admittedly not been received by September 5, 1974. As for IIPL, accepting as the District Court did the testimony of Ms. Blacker, those answers could not have been signed by Sands and notarized by Mr. Bader before 9:30 A.M. on September 5; and if signed and notarized that day, that could only have occurred after Ms. Blacker left the office at about 3:30 P.M. —and if Mr. Bader was present then (which he denied) it was clear that he had mailed the unconformed copies. With respect to the Randolph answers,* although Randolph submitted an affidavit almost two months after the hearings closed to the effect that he had mailed his answers in California on September 3, 1974 (JA 605-606), had those answers arrived on September 5 they would have been delivered no later than 1:45 P.M., and Mr. Bader would, before allegedly departing from the office, have seen the answers which he claimed he was anxiously awaiting.

The Alleged Fagan Answers

As noted (p. 3 *supra*), Appellants' Brief at various places states that Fagan's answers had been mailed to Mr. Bader on August 30, 1974. This does not appear in the

* It was conceded that those answers were incorrect and insufficient (JA 563) and the District Court had also been asked to dismiss because of their manifest non-compliance with the Court's order in such respects (JA 306-310).

record, but we refer to the matter since it is referred to in Appellants' Brief.

In connection with a motion to this Court to remand this appeal, Mr. Bader presented an affirmation of his dated March 25, 1976 and an affidavit of Fagan dated March 22, 1976. The gist of those papers was (a) that about August 30, 1974, Fagan signed his answers and mailed them to Mr. Bader but somehow, mysteriously, those answers were never received by Mr. Bader; (b) that about September 10, 1974 Mr. Bader sent a letter to Fagan stating that the answers had not been received and asking for their return (JA 388a) but somehow, mysteriously, that letter was never received by Fagan, and (c) that somehow, in the more than 1⅓ years that had elapsed since the formal hearing before Judge Owen closed and in the more than 1 year since the final papers were filed, Mr. Bader never found out that his client Fagan had mailed the answers and Fagan similarly never found out that the answers had not been received.

Although it is plain that this is but a continuation of the "concocted story," even if one were to credit it, it simply further confirms that on September 5, 1974 Mr. Bader did not have Fagan's answers (and, indeed, had no knowledge of their status) when the unconformed copy of Fagan's answers was mailed to the Rosenman firm for the purpose, as the District Court found, of having that firm believe that the original answers had been received by Mr. Bader and that due and timely service was being made (JA A39-40).

ARGUMENT

POINT I

The claim that the date of compliance with the Court order was September 9 and not September 5, 1974.

Appellants' Brief (pp. 14-16) asserts, without citing authority, that all the District Court's findings are "irrelevant" because the date for compliance with the Court's order of August 16, 1974 was September 9, not September 5—on the theory that, since Fed. R. Civ. P. 77(d) provides that the Clerk, immediately upon the entry of an order, shall serve a notice of entry by mail, there was an automatic 3 day extension under Fed. R. Civ. P. 6(e).

Under this theory, every time a Court directs that something be done by a particular date and the Clerk gives notice of the order by mail, a party automatically has a 3 day extension in which to do the act. Apparently, if the Clerk fails to give any notice, the party does not have to perform the act at all.

There is no substance to this contention. The notification by the Clerk provided in Rule 77(d) is "a mere accommodation service" and is "merely for the convenience of litigants." Advisory Committee Notes to the 1948 amendment of Rules 73(a) and 77(d), quoted in 12 Wright and Miller, *Federal Practice and Procedure*: Civil §3084; 7 Moore's *Federal Practice* (2d ed.) ¶77.05, p. 77-10 ("This duty laid upon the clerk was to provide an accommodation service for the litigants.").

Rule 6(e) itself provides that it is applicable only when a party is "required to do some act . . . within a prescribed period *after the service of a notice or other paper upon him* . . ." (emphasis added). The District Court's order did not provide that the further answers be served within a prescribed period after the service of a notice upon

plaintiffs: it directed that the answers be served within 20 days after August 16, 1974. The cases clearly show that, unless an order expressly prescribes that the act provided for shall be done within a period after service of notice, the Clerk's notification has no effect on the time for compliance with the Court's order. *Clements* v. *Florida East Coast Railway Company*, 473 F. 2d 668, 670 (5th Cir. 1973); *Sonnenblick-Goldman Corp.* v. *Nowalk*, 420 F. 2d 858, 860 (3d Cir. 1970).

There is no doubt that Mr. Bader knew at the time of the August 16, 1974 order, for it was made in open Court on the argument in his presence (JA 398) and the Appellants' Brief asserts (p. 15) that notice thereof was sent to him the same day by the Clerk. Appellants' Brief (p. 15), seeking to cast doubt on when compliance was due under the Court's order, says that the order does not say "20 days from what." The Court's order dated August 16, 1974, says that it shall be complied with "in twenty days time." Even if it could be argued that this did not show on the order's face that what was meant was 20 days from August 16, a Court's order as a matter of law speaks as of the date it is made or as of the date that it is filed. *Clements* v. *Florida East Coast Railway Company*, *supra*. In this case, both dates were the same: August 16, 1974.

Mr. Bader, of course, knew that the order required compliance within 20 days of its date. In an affirmation dated September 11, 1974 he stated (JA 385): "This Court has heretofore directed the service of further answers to interrogatories within twenty (20) days *from the date of the Order of the Court.*" (emphasis added)

The statement of facts (p. 3 *et seq. supra*) shows that Mr. Bader knew that September 5 was the last day for service under the Court's order, and in fact he repeatedly so testified. As brief examples that could be multiplied, he said (JA 12, 16, 21):

> "Q. You knew that September 5th was the last date on which you could serve the answers to interrogatories, didn't you?

"A. Well, I certainly knew that that was what they called for by the order of the Court, yes, sir.

* * *

"A. . . . if those things had not come in on September 5th it would have been necessary for me to make a motion for an extension of time with respect to filling those answers . . .

* * *

"The Court: And that [September 5] was the last day to mail?

"The Witness: Yes, sir." (matter in brackets added).

As for the present claim that service on September 9 would have been timely, this is Mr. Bader's testimony (JA 38, 39):

"The Court: If we assume that you are speaking of the copies that you were aware on the 9th that you were at that point four days late in service—

"The Witness: Yes, sir. Absolutely.

* * *

"The Court: Hold on. If this was to be service of the answers, then on the 9th the service of the answers was late.

"The Witness: Yes, sir, absolutely.

"The Court: And you were aware it was late.

"The Witness: Absolutely."

We believe that there is so little substance to this point that we do not pause to demonstrate that the claim of "irrelevance" could not be substantiated even if September 9 were the last day for service.

POINT II

The claim that Michael was not a plaintiff and therefore had no obligation to answer interrogatories.

The original complaint in this action was dismissed by Judge Griesa for legal insufficiency with leave to serve an amended complaint complying with the rules of pleading (JA A10). An amended complaint was filed (though late) in January 1974 (JA A10). The amended complaint did not contain the name of the plaintiff Michael in the caption, though in the body of the complaint he was treated no differently than the other individual plaintiffs (JA 249-257).

When, in July 1974, the first answers to interrogatories were served, those answers, signed by Mr. Bader, stated that information was being supplied therein "with respect to plaintiff Michael" as well as Fagan, Randolph and HPL (JA 266-268). When, in August 1974, Touche Ross moved with respect to those answers, it specifically noted the absence of Michael's name from the caption but stated that obviously he was still a plaintiff (JA 239).

Mr. Bader did not then say that Michael was no longer a plaintiff but, on the contrary, in the following ways, among others, made clear that Michael was a plaintiff: (1) In response to the aforesaid motion, Mr. Bader stated that he had written to each of the plaintiffs, and subsequently submitted a letter dated August 15, 1974 to Michael asking for information to respond to the interrogatories (JA 288, 387); (2) On September 5, 1974, he sent to the Rosenman firm the unconformed copies of Michael's answers which recited that they were the answers of "plaintiff, Gary Michael" (JA 352-354); (3) In his letter to the Court of September 11, 1974, Mr. Bader reaffirmed that Michael had not been eliminated from the case (JA 380-382); (4) On September 11, 1974, Mr. Bader made a motion for an extension of time on behalf of "plaintiffs Michael Fagan and Gary Michael" (JA 384-387); (5) On September 18, 1974, Mr. Bader affirmed that he had received the an-

swers "of the plaintiff Michael" (JA 374); (6) On October 17, 1974, Mr. Bader purported to file a notice of voluntary dismissal on behalf of Michael and Fagan "plaintiffs herein" and a few days later Mr. Kass purported to do the same thing (JA 231, 228). And, under date of September 16, 1974, Michael himself proclaimed that he was still a plaintiff and his proclamation was endorsed by Mr. Bader (JA 389-391).

How does Mr. Bader explain the fact that he heretofore did not take the position that Michael was no longer a plaintiff? He says that he "was not aware of this heretofore because of the coincidence in the names of Gary Michael and Michael Fagan." Appellants' Brief, p. 18. He, the man who allegedly eliminated Michael as a plaintiff, was unaware that he had done so!

It is thus apparent that Michael was a plaintiff in this action after the service of the amended complaint, and that Mr. Bader knew that and acted accordingly. The docket entries show Michael as a plaintiff and there is no docket entry showing that he was dropped as a plaintiff when the amended complaint was served (JA A9-12). No case has been cited showing that parties may be dropped simply by omitting their names from a caption, which may be a mere typographical error (as Mr. Bader's actions clearly indicated was the case here). Parties are eliminated by a motion and an order of the Court. It is not a question under which Rule the motion must be made: a motion must be made and an order entered.* In each of the cases cited in Appellants' Brief (p. 17), the plaintiff moved to eliminate a party defendant and the Court acted on the motion. No one here ever moved to drop Michael as a plaintiff and no order to that effect was entered before service of the amended complaint. When Judge Griesa dismissed the original complaint, he gave leave to file an amended complaint expressly for the purpose of permitting

* Although Appellants' Brief stated that in an affidavit Touche Ross took some position based on Fed. R. Civ. P. 21, this is not the case (see JA 239); and although appellants cite Fed. R. Civ. P. 15(a), no motion under that Rule was ever made.

plaintiffs to plead the alleged wrongs with sufficient particularity (JA A10). He gave no leave to drop Michael as a plaintiff.

It is clear that there is no substance to this afterthought with respect to Michael.

POINT III

The claim that if plaintiffs had mailed signed answers to their counsel, he could serve unconformed copies thereof even though he did not know the answers had been mailed to him and even though they never arrived.

Appellants' Brief (pp. 18-19) says that assuming that Randolph had mailed his answers to Mr. Bader on September 3, 1974 and that Fagan had mailed his answers to Mr. Bader on August 30, 1974—neither of these claims being "admitted" or "conceded" as Appellants' Brief suggests—Mr. Bader, even though he did not know of such alleged mailings, could properly mail the unconformed copies on September 5. Appellants' Brief states (p. 19) that once the answers had been allegedly mailed by his clients to Mr. Bader, there had been compliance with the Court's order. In other words, if signed answers are mailed by a party to his own attorney by slow boat from Hong Kong, timely service is thereby effected even though the answers never arrive in said attorney's office.

No case is cited that supports this extraordinary proposition,* and it is plainly untenable. The mailing of papers by a party to his own attorney does not constitute service on the adversary. Service by mail on a party must be made by mailing a copy to the party's attorney. Fed. R. Civ. P. 5(b). The Rules recognize that an original must

* Including the New York State cases cited by appellants. Further, Federal rather than State rules control the question of propriety of service in the Federal courts. *Mid-Continent Casualty Co.* v. *Everett*, 340 F. 2d 65, 69 (10th Cir. 1965); 2 Moore's *Federal Practice* (2d ed.) ¶5.07, p. 1355.

be in hand before a copy is served; for they provide for the filing of the original either *before service* or promptly thereafter [Fed. R. Civ. P. 5(d)] and under the District Court's General Rule 6(c), relating to answers to interrogatories, that must be done no later than 2 days after service.

POINT IV

The claim that the failure to conform the copies was a mere irregularity and therefore service was proper.

Appellants' Brief (pp. 20-22) states that failure to conform copies of originals is a mere irregularity and therefore service was proper. Assuming non-conformance to be ordinarily a mere irregularity, appellants' observation is irrelevant and the asserted conclusion therefrom a *non sequitur*. This is not a case where an attorney has originals in hand and accomplishes service by mailing unconformed copies (which was what Mr. Bader sought to have the Rosenman firm believe). Here the unconformed copies were mailed without the attorney having the originals—and the New York cases cited by appellants are wholly inapposite.

POINT V

The claim that plaintiffs' attorney on September 5, 1974 had all the information necessary to answer the interrogatories and he could have verified the answers.

This basically irrelevant claim in Appellants' Brief (pp. 22-23) is legally and factually unsupportable.

The order of August 16, 1974 specifically directed that each plaintiff (Randolph, Michael, Fagan and IIPL) "respond, separately and fully in writing under oath" (JA 248, 293, 293a); as indeed is required by Fed. R. Civ. P. 33(a), an attorney's verification being insufficient. *McDougall* v. *Dunn*, 468 F. 2d 468, 472 (4th Cir. 1972).

Nor did plaintiffs' attorney have the necessary information on September 5 to answer the interrogatories even if he were entitled to do so: the Randolph answers as belatedly produced, were admittedly grossly incorrect, inadequate and insufficient (JA 306-310, 420); the Michael answers as belatedly produced were at variance with information had by plaintiffs' attorney (JA 390, 387); the HPL answers were also incorrect, inadequate and insufficient (JA 302-306); and no answers of Fagan were ever produced.

POINT VI

The claim that dismissal of the complaint and imposition of sanctions were unwarranted.

Appellants' Brief (pp. 23-25) claims that dismissal of the complaint and the imposition of sanctions were unwarranted under this Court's decision in *Flaks* v. *Koegel*, 504 F. 2d 702 (2d Cir. 1974). The dismissal and the imposition of sanctions were within the ruling in *Flaks*, a ruling of which Judge Owen was aware when he entered his order. See *Charron* v. *Meaux*, 66 F.R.D. 64, 68 (S.D. N.Y. 1975). In *Flaks* this Court stated (504 F. 2d at 709) that the order there involved was only "sustainable if it has been demonstrated that the defendants' failure to comply was in fact due to willfulness, bad faith or fault and not to an inability to comply."

In *Flaks*, the District Court had entered a large default judgment by reason of defendants' refusal to comply with an order of the Court. The defendants had thereafter moved under Fed. R. Civ. P. 60(b) to vacate the order directing judgment, in which motion they claimed that they were the victims of prior counsel, that there had been unawareness of the Court's order, that prior counsel had discouraged other attorneys from representing defendants and had refused to turn over his records to new counsel. The District Court denied the motion without holding an evi-

dentiary hearing. This Court reversed and remanded on the ground that an evidentiary hearing was necessary in order to determine whether the non-compliance was due to "inability to comply."*

Here, Judge Owen did direct the holding of an evidentiary hearing. The plaintiffs did not want the hearing and took every action they could to avoid it (pp. 11-12 *supra*). At the hearing, plaintiffs and Mr. Bader were free to present evidence. The only plaintiff that appeared was IIPL through Sands. Mr. Bader was given ample time and opportunity: his requests for adjournments of the hearing were honored, the first session being held about 6 weeks after it had been first directed, subsequent sessions being held thereafter and the hearings concluded with no request being made for further hearings (JA 560, 428, 1, 222). The decision of the District Court reflects a careful consideration of the evidence, and the findings show willfulness, bad faith and fault (JA A25-42).

The cases clearly show that the sanctions of dismissal and payment by IIPL and Mr. Bader of Touche Ross' expenses, including attorneys' fees, were fully warranted. With respect to dismissal, in one of the cases cited in Appellants' Brief (p. 24), this Court affirmed the dismissal of a claim under Fed. R. Civ. P. 37(b) and (d) under circumstances far less compelling than those that appear here. *Grace* v. *Fisher*, 355 F. 2d 21 (2d Cir. 1966). There are numerous cases approving the sanctions of dismissal under

* Although not cited by appellants, we have noted this Court's decision in *Securities & Exch. Com'n.* v. *Research Automation Corp.*, 521 F. 2d 585 (2d Cir. 1975). There a default judgment entered against a defendant was also reversed, but the reversal was predicated on the fact that the plaintiff had not first obtained a court order pursuant to Fed. R. Civ. P. 37(a), which the Court held was required by proper procedure. Here, of course, Touche Ross did obtain a court order pursuant to Fed. R. Civ. P. 37(a) (JA 235 *et seq.*, 293, 293a). In *GFI Computer Industries, Inc.* v. *Fry*, 476 F. 2d 1 (5th Cir. 1973), cited in Appellants' Brief, p. 24, whose facts bear no relationship to those here, there had also been a failure first to obtain an order under Fed. R. Civ. P. 37(a).

circumstances no more and, indeed less, persuasive than those that exist here.*

With respect to Touche Ross' expenses, Fed. R. Civ. P. 37(b) and (d) expressly provide that if a party shall fail to obey a discovery order or to answer interrogatories, the court "*shall* require the party . . . or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust" (emphasis added). The Advisory Committee Note of 1970 to Amended Rule 37 makes clear that the purpose of these provisions is to ensure "that expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably . . ." and that the burden is on the losing party to show that the circumstances are such that expenses should not be awarded. 4A Moore's *Federal Practice* (2d ed.) ¶37.01[8], pp. 37-24 to 37-26; ¶37.03[2.-7], p. 37-77.

Courts have thus compelled the payment of expenses, including attorneys' fees, by parties and counsel: *e.g.*, *United Sheeplined Cloth. Co.* v. *Arctic Fur Cap Corp.*, 165 F. Supp. 193 (S.D.N.Y. 1958) (involving Mr. Bader); *Hayden Stone, Inc.* v. *Brode*, 508 F. 2d 895 (7th Cir. 1974); *Shapiro* v. *Freeman*, 38 F.R.D. 308 (S.D.N.Y. 1965); *Braziller* v. *Lind*, 32 F.R.D. 367 (S.D.N.Y. 1963); *Hunter* v. *International Systems & Controls Corp.*, 56 F.R.D. 617, 631-2 (W.D. Mo. 1972); *Kaminski* v. *Shawmut Credit*

* *Bourgeois* v. *El Paso Natural Gas Co.*, 20 F.R.D. 358 (S.D. N.Y. 1957), aff'd 257 F. 2d 807 (2d Cir. 1958); *Interstate Cigar Co.* v. *Consolidated Cigar Co.*, 317 F. 2d 744 (2d Cir. 1963); *Diapulse Corporation of America* v. *Curtis Publishing Co.*, 374 F. 2d 442 (2d Cir. 1967); *Mangano* v. *American Radiator & Standard San. Corp.*, 438 F. 2d 1187 (3d Cir. 1971); *Hastings* v. *Maritime Overseas Corp.*, 411 F. 2d 1201 (3d Cir. 1969); *General Dynamics Corp.* v. *Selb Manufacturing Co.*, 481 F. 2d 1204 (8th Cir. 1973), cert. den. 414 U.S. 1162 (1974); *Textile Products* v. *Formax Mfg. Corp.*, 13 F.R.D. 302 (E.D. Mich. 1952); *United States* v. *Cotton Valley Operators Committee*, 9 F.R.D. 719 (W.D. La. 1949), aff'd 339 U.S. 940 (1950); *Fond du Lac Plaza, Inc* v. *Reid*, 47 F.R.D. 221 (E.D. Wis. 1969); *Harlem Book Company* v. *Hurtt*, 31 F.R.D. 177 (E.D. Mo. 1962), app. dis. 308 F. 2d 949 (8th Cir. 1962); see *Kelley* v. *United States*, 338 F. 2d 328 (1st Cir. 1964).

Union, 18 Fed. Rules Serv. 2d 1508 (D. Mass. 1974); *Powerlock Systems, Inc.* v. *Duo-Lok, Inc.*, 56 F.R.D. 50 (E.D. Wis. 1972); *De Bouard & Cie* v. *S. S. Ionic Coast*, 46 F.R.D. 1 (S.D. Tex. 1969); *Osolin* v. *S. S. Colorado*, 1 Fed. Rules Serv. 2d 37a.22, Case 1 (N.D. Calif. 1958); *Allen* v. *United States*, 16 Fed. Rules Serv. 37b.21, Case 1 (E.D. Pa. 1951).

The statements in Appellants' Brief, pp. 24-25, apparently to show "inability to comply," do not tell the story.* This Court has said, in discussing sanctions, that "the particular facts must control. The question is one of discretion, and in exercising it . . . [the Court is] permitted to take into account the full record of the case before him." *Diapulse Corporation of America* v. *Curtis Publishing Co.*, 374 F. 2d 442, 447 (2d Cir. 1967) (matter in brackets added).

The fact is that these interrogatories had been outstanding since November 1, 1973. They were of the simplest kind, relating to matters unquestionably within the plaintiffs' knowledge. They could have and should have been answered within the 30 days provided by Fed. R. Civ. P. 33(a). Directions by two Judges thereafter for the service of the answers were ignored.** Finally, only one plaintiff, IIPL, answered. That was about 8½ months after the interrogatories had been served, and its answers were inadequate and insufficient. And when thereafter the Court granted Touche Ross' Rule 37(a) motion, the events described at length above took place; and even the answers belatedly tendered were inadequate and insufficient (p. 33 *supra*). There was here no "inability to comply"; there was a deliberate effort not to comply apparently because plaintiffs were on notice that the answers were desired to support a motion to dismiss the amended complaint (JA 226-227).

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* Nor are those statements "conceded", as the Appellants' Brief (p. 25) erroneously states.

** These orders, though oral, could not be ignored. *Henry* v. *Sneiders*, 490 F.2d 315, 318 (9th Cir. 1974), cert. den. 419 U.S. 832 (1974).

POINT VII

The claim that the District Court had no jurisdiction to proceed.

Appellants' Brief (pp. 25-29) claims that upon the filing of the several purported notices of voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(i) before any answer or motion for summary judgment had been filed (p. 12 *supra*), the Court lost all jurisdiction to proceed. However, whatever might otherwise have been the case, this action is a class action and there had not been at the time, and there never was, a determination that it was not a class action (JA A5, A9-12).* The right to dismiss the action is therefore governed not by Rule 41(a)(1) but by Fed. R. Civ. P. 23(e) which provides that "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

Fed. R. Civ. P. 41(a)(1) expressly provides that it is "Subject to the provisions of Rule 23(e)", making clear on its face that it does not apply to class actions. As stated in 3B Moore's *Federal Practice* (2d ed.) ¶23.80 [2.-1]:

> "The provision of revised [23](e), like its predecessor in original (c), that a class action *shall not be dismissed* without court approval is mandatory, and while the requirement as to notice does not apply to involuntary dismissals, the requirement of court approval does. Rule 23(e) is a recognized exception to the general applicability of Rule 41(a)(1), on voluntary dismissal before trial; . . .
>
> . . . and it has been held that prior to the court's initial determination, required by Rule 23(e)(1), as to whether an action brought as a class action is to be so

* The notice with respect to Randolph, the first filed, specifically recited: "This action continues as a Class Action against all Defendants in behalf of Plaintiff Independent Investor Protective League" (JA 229-230).

maintained, the action must be presumed to be a class action subject to the requirements of Rule 23(e)." (matter in brackets inserted).

In accord: 3B Moore, *supra* ¶23.80[2]; *Gaddis* v. *Wyman*, 304 F. Supp. 713, 715 (S.D.N.Y. 1969); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 42 F.R.D. 324 (E.D. Pa. 1967); *Yaffe* v. *Detroit Steel Corp.*, 50 F.R.D. 481 (N.D. Ill. 1970).

Appellants' Brief (p. 29) states that notices of voluntary dismissal are effective in a class action where it has not yet been certified as such, but no authority is cited in support of that proposition. All of the authorities cited above are expressly and directly contrary to appellants' assertion.

Appellants' Brief correctly notes that if a Rule 41(a)(1)(i) voluntary dismissal is appropriate, it is effective upon filing with the clerk of the Court without Court approval. *Miller* v. *Reddin*, 422 F.2d 1264 (9th Cir. 1970); *American Cyanamid Company* v. *McGhee*, 317 F.2d 295 (5th Cir. 1963). However, where such a voluntary dismissal may *not* properly be filed, the Court has no power by its endorsement to endow it with validity. *Hyde Construction Company* v. *Koehring Company*, 388 F.2d 501, 508 (10th Cir. 1968), cert. den. 391 U.S. 905 (1968).

In this case, the Rule 41(a)(1)(i) notice as to Randolph, the first notice filed, was signed by Judge MacMahon on October 15, 1974 (JA 229-230). Touche Ross had received a copy of a letter dated October 9, 1974 from Mr. Bader to Judge Owen enclosing an unconformed copy of that notice which Mr. Bader said he felt it "appropriate" to file (SA 1-7) and there was no provision in it for Court approval and no notice that Court approval would be sought. On October 15, 1974, although consolidation was contemplated, none had been effected (JA 430-435). Judge MacMahon's signature gave no validity to the Rule 41(a)(1)(i) notice (*Hyde Construction Company* v. *Koehring Company, supra*), and having been obtained *ex parte*, without any notice to the Rosenman firm or the "class", there was obviously a failure to meet the requirements of Rule 23(e).

After the Rosenman firm learned of the circumstances and brought the foregoing to Judge MacMahon's attention (JA 600-601), he withheld any signature from the purported Rule 41(a)(1)(i) voluntary dismissal of IIPL, Michael and Fagan until after Judge Owen's order had been entered (JA 228).

The Rule 41(a)(1)(i) notices of voluntary dismissal were accordingly nullities, and Judge Owen had jurisdiction to proceed as he did.

POINT VIII

The claim that the sanction of attorneys' fees is inappropriate because of the alleged conduct of Touche Ross' counsel.

In an affidavit dated September 16, 1974 submitted by Mr. Eno, an error was made (JA 414). Mr. Eno had been informed and believed that all of the answers had come in one envelope (JA 212-213). He subsequently located one of the envelopes (JA 599), which was too small to accommodate the IIPL answers (JA 476-544), and concluded that there had been two mailings. Mr. Eno voluntarily corrected his erroneous statement at the hearing and voluntarily produced the envelope that had been found (JA 212-213).

While any error is to be regretted, as it is here, in this case the error was voluntarily corrected and played no part in the decision. The Court found that there were two mailings, one containing the IIPL answers and the other containing the answers of the individual plaintiffs (JA A27-28).

While Appellants' Brief (p. 30) also charges that Mr. Eno gave false testimony at the hearing, it is difficult to understand what that is supposed to have been. The Brief (p. 32) says that the large envelope in which the IIPL answers arrived was "conveniently 'lost' " because it would have shown the error—but the error was voluntarily shown

by Mr. Eno at the hearing. The Brief (p. 32) then says that Mr. Eno had to state, "to avoid disbelief by the Court", that he did not know in which envelope the individual answers arrived. We do not understand this: answers of the individual plaintiffs obviously came in the smaller envelope but Mr. Eno said that he could not testify that all of them had come in that envelope (JA 212).

Appellants' Brief (p. 33) also charges that Mr. Eno submitted a false affidavit as to the mailing of the Randolph answers. Although Randolph failed to appear at the hearings, for which he and Mr. Bader should have been eager, Mr. Bader, almost two months after the hearings concluded, submitted an affidavit from Randolph in which he claimed to have mailed his answers on September 3, 1974 by 1:00 P.M. at a Post Office in San Diego, California (JA 605-606). The affidavit was obviously "tailor made" in an attempt to show delivery could have taken place in New York on September 5. In response, Mr. Eno noted that the Post Office Department had advised the Rosenman firm that even if Randolph had mailed his answers in San Diego on September 3, but if he had done so after 5:30 P.M. in a letter box, the answers would not have been delivered in New York on September 5 (JA 470). The affidavit was truthful and has not been shown to have been otherwise.

In a memorandum after the hearings, Mr. Bader claimed that at the argument on September 20, 1974 (p. 11 *supra*) he had told Judge Owen that Sands had been to his office on September 9 to read the return addresses. Mr. Bader never prior thereto claimed that he had told that to the Court on September 20, and in an affidavit Mr. Eno said that Mr. Bader had made no such statement on September 20 (JA 470). The manner of Mr. Bader's testimony at the hearing shows that he knew that such claim would come as a surprise (JA 26-27); and, indeed, while Touche Ross' notice of the hearing asked for records to show Sands' whereabouts on September 5 it did not make a similar request with respect to September 9 because until the hearings this claim was unknown (JA 428).

Appellants' Brief (p. 33) says that the affidavit of Mr. Eno with respect to what was not said on September 20 is false, and that the Court's notes (JA 597) confirm Mr. Bader's claim. They do not. Appellants' Brief (p. 33) says that the Court's notes say "knew on 9th that Sands said." While even this would not confirm appellants' claim, this is not what the Court's notes say. Appellants have taken liberties with those notes and have run two separate things together (see JA 597). It is evident that the Court began to write a sentence beginning "Knew on 9th that" and did not complete it; and then later began another sentence starting "Sands said" and did not complete that.*

Appellants raised all these matters in the District Court and they were not sustained. There is clearly no merit to this point in Appellants' Brief.

POINT IX

The claim that plaintiffs were entitled under the Seventh Amendment to a jury trial.

The Appellants' Brief (pp. 34-36), referring to the Seventh Amendment (U.S.C.A. Constit. Amend. VII), claims that, because plaintiffs had endorsed a jury demand on the original and amended complaints, they were entitled to a jury trial on the evidentiary hearing in connection with Touche Ross' motions under Fed. R. Civ. P. 37(b) and (d).

No authority is cited for this proposition.

The shortest answer to the claim is that the plaintiffs participated in the hearing before Judge Owen without making any request for a jury trial before or at the hearing (JA 1-224). If they had any right to a jury trial (which they

* One could complete these sentences to read "Knew on 9th that Rosenman firm had sent a letter" (which is what Mr. Bader had said in his letter of September 11 [p. 10 *supra*]) and "Sands said he had mailed answers" (which is what Sands had said in his affidavit of September 17 [p. 10 *supra*]).

did not have), such participation constituted an effective waiver of such right. *National Family Ins. Co.* v. *Exchange Nat. Bank of Chicago,* 474 F. 2d 237 (7th Cir. 1973), cert. den. 414 U.S. 825 (1973); *Smith* v. *Cushman Motor Works,* 178 F. 2d 953 (8th Cir. 1950); *Wool* v. *Real Estate Exchange,* 179 F. 2d 62 (D.C. Cir. 1949); see *Chapman* v. *Kleindienst,* 507 F. 2d 1246, 1253 (7th Cir. 1974).

Appellants' position is wrong on broader grounds. Fed. R. Civ. P. 38(b) expressly provides for a jury trial of "any issue triable of right by a jury." This is consonant with the Seventh Amendment which, by its terms, applies only to "Suits at common law" and which "preserves" the right to a jury trial of issues so triable under common law principles. 5 Moore's *Federal Practice* (2d ed.) ¶38.08[5], p. 79 *et seq.* The issue before Judge Owen was whether the plaintiffs had failed to comply with a Court order and the circumstances relating thereto. It has long been held that the Court, and not a jury, has the right to inquire whether there has been a failure to comply with an order and to proceed accordingly. In *In re Debs,* 158 U.S. 564, 594-595 (1895), the Supreme Court said:

> "Nor is there . . . any invasion of the constitutional right of trial by jury. . . . [T]he power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

Fed. R. Civ. P. 37(b) and (d) expressly states that the orders therein provided for shall be made by "the *court*" and that certain events shall occur "unless the *court* finds" otherwise (emphasis added). Indeed, if that were not the

case, there could be not one but any number of jury trials in a case in which a jury has been demanded; the resulting delays would virtually ensure that such cases would never be reached for trial; and court orders could never effectively be enforced.

It is obvious that this point is without merit.

POINT X

The claim that plaintiffs were entitled under the Sixth Amendment to a jury trial.

The Appellants' Brief (pp. 37-39), referring to the Sixth Amendment (U.S.C.A. Constit. Amend. VI), claims that because the District Court found that Mr. Bader and Sands had given false testimony and made false statements, and because Judge Owen said that he was referring the record under Rule 5(f) of the General Rules of the District Court providing for the disciplining of attorneys, plaintiffs and Mr. Bader were entitled to a jury trial in the District Court.

No case is cited that supports this claim. The Sixth Amendment provides that in "criminal prosecutions" the accused shall have the right to a jury trial, to be informed of the accusation and to be confronted with the witnesses against him.

The proceeding before Judge Owen was not a criminal proceeding. Although Appellants' Brief states that disbarment proceedings are criminal in nature, the proceeding before Judge Owen was not a disbarment proceeding. Even if it were, it is clear that there is no right to a jury trial in a disbarment proceeding. 5 Moore's *Federal Practice* (2d ed.) ¶38.08[5], p. 86; *Ex parte Wall,* 107 U.S. 265, 288 (1882); *People ex rel. Karlin* v. *Culkin,* 248 N.Y. 465, 477 (1928) (per Cardozo, Ch.J.). Indeed, a case cited by appellants, *Erdmann* v. *Stevens,* 458 F. 2d 1205 (2d Cir. 1972), cert. den. 409 U.S. 889 (1972), makes clear that the disciplining of attorneys is the function of the Court alone.

The cases cited by appellants are inapposite. Thus in *In re Ruffalo*, 390 U.S. 544 (1967) it was determined that it was a violation of due process to disbar an attorney on a charge which was not included in the original charges against him in the disciplinary proceeding but which was added after he had testified in that proceeding. The case has nothing to do with this matter.

Appellants' Brief (p. 39) claims that Mr. Bader "was unaware of the fact that serious questions of the professional ethics of the said attorney were being considered." This is almost ludicrous in the light of the papers submitted *before the hearing* (e.g., JA 296-312, 377-379, 392-402, 409-417, 590-592; SA 8-9) in which, in letter and affidavit, it was alleged that Mr. Bader was guilty of "deceptive practice", that he had tried to "mislead" and to "deceive" the Rosenman firm, that he had made "deliberate misstatements to the Court", and that the Rosenman firm believed that there had been a "serious violation of the standards of practice in this Court" (JA 298, 301, 393, 592; SA 9). In his letter of September 11, Mr. Bader acknowledged that he had been "accused of attempting to mislead" the Rosenman firm (JA 545) and he testified that he knew on September 10 that that firm regarded his conduct as "unprofessional practice" (JA 31).

The District Court found that by September 11, Mr. Bader "was aware of the fact . . . that the Rosenman firm had raised serious questions with the Court as to a deception on his part, . . ." (JA A39).

Of course, Touche Ross could not anticipate that at the hearing the bizarre story told by Mr. Bader and Sands would unfold. But they knew that.

POINT XI

The claim that there were procedural irregularities before the District Court mandating a new hearing.

The claim of "procedural irregularities" in Appellants' Brief (pp. 40-41) is based on the facts that (a) Judge Owen made findings as to what had occurred before him on September 20, 1974 although no stenographic transcript of those proceedings had been made, and (b) he handed over his handwritten notes of those proceedings that were marked (JA 597-598).

As for the first point, Appellants' Brief says (p. 40) that the vice is that there is no record of what was said on September 20 for appellate consideration. What occurred before the Court on September 20, 1974 was testified to by Mr. Eno (JA 211-212; SA 10-11). There is thus a sworn record of what was said for appellate consideration.

As for the second point, Appellants' Brief (p. 40) says that by handing over his handwritten notes Judge Owen became a "witness." There is no substance to this. We know of no authority holding that in reaching a conclusion a Court may not consider what is said to it in open Court by an attorney, even though a reporter is not present. In response to Mr. Eno's testimony regarding the events of September 20, Mr. Bader stated that he could not recall that he had made his statements to the Court on September 20 and that if he did make them they were incorrect; and in that connection Judge Owen in an impartial manner handed over his notes to give Mr. Bader an opportunity to explain what Judge Owen believed had been said (JA 218-220). Mr. Bader raised no objection to that or to the marking of the notes (JA 218-220).

POINT XII

The claim that the findings of the District Court were "clearly erroneous".

The findings of the District Court may not be set aside unless "clearly erroneous." Fed. R. Civ. P. 52(a). In this regard, the Rule provides that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

By ignoring that provision of the Rule, by claiming that certain matters were "conceded" when in fact they were contested, and by ignoring all the circumstances noted at p. 3 *et seq., supra,* Appellants' Brief (pp. 40-43) asserts that the findings of the District Court were "clearly erroneous." The facts show that this claim is wholly without merit.

Conclusion

The order appealed from should be affirmed.

Respectfully submitted,

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LAWRENCE R. ENO
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Of Counsel

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Richard H. Feinsinger , being duly sworn, deposes and says that he is not a party to this action and is over 18 years of age. On the 28th day of April, 1976 deponent served two copies of the annexed Defendant-Appellee's Brief and Supplemental Appendix upon the following named attorney at the address indicated by depositing true copies thereof enclosed in properly addressed postpaid wrappers in an official depository of the United States Postal Service within the State of New York:

I. Walton Bader, Esq.
65 Court Street
White Plains, New York 10601

Richard H. Feinsinger

Richard H. Feinsinger

Sworn to before me this

28th day of April , 1976.

Arthur Stuart Kramer

Notary Public

ARTHUR STUART KRAMER
Notary Public, State of New York
No. 31-4600850
Qualified in New York County
Term Expires March 30, 1977

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